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GOH MING HAN v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
ZAKARIA SAM JCA
ABDUL RAHMAN SEBLI JCA
B [CRIMINAL APPEAL NO: M-05-36-02-2014]
23 FEBRUARY 2015

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 105.60g of methamphetamine – Whether presumption of trafficking under s. 37(da) rebutted – Conviction and sentence for possession of drugs – Whether accused person had custody or control of drugs – Whether accused person had exclusive access of premise where drugs were found – Presumption of knowledge – Discrepancies in prosecution's evidence – Failure to subject prosecution's evidence to maximum evaluation – Whether reasonable doubt raised in prosecution's case –*
D *Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 12(2), 37(d)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Discrepancies in prosecution's evidence – Material contradiction of prosecution witness – Whether detrimental to prosecution's case – Whether container containing drugs recovered from police search – Failure to subject prosecution's*
E *evidence to maximum evaluation – Whether reasonable doubt raised in prosecution's case*

The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 105.60g of methamphetamine. A police
F party led by SP8 raided a house where the door of the house was opened by a female ('SP2'). After gaining entry into the house, SP8 together with SP2 proceeded to a room located in the middle of the house. Inside the room, SP8 saw the appellant sitting on a mattress while another female, SP3 was at the edge of the same mattress. According to SP8, the appellant went to the right side of the mattress, picked up an ice cream container from the floor and
G handed it to him. Inside the container were the drugs which the chemist later confirmed to be 105.60g of methamphetamine. Possession without lawful authority of 50g or more of this drug would trigger the presumption of trafficking under s. 37(da) of the DDA. At the conclusion of the defence case, the Judicial Commissioner ('JC') acquitted and discharged the appellant of
H the trafficking charge because the appellant had succeeded in rebutting the presumption of trafficking under s. 37(da) of the DDA. However the JC found the appellant guilty of an offence under s. 12(2) read together with s. 39A(2) and sentenced him to 17 years imprisonment and ten strokes of the rotan. Aggrieved, the appellant appealed against his conviction. The
I appellant contended, *inter alia*, that the JC failed to conduct a maximum evaluation of the evidence adduced by the prosecution. The prosecution's case, through the evidence of SP8 was that it was the appellant himself who handed to him the ice cream container containing the drugs. On the contrary,

SP8's testimony was contradicted by SP2 and SP3 who testified that the ice cream container was recovered as a result of the police search. The testimony of SP2 regarding the presence of a white plastic which the appellant allegedly brought into the room was also doubtful. The JC however dismissed the contradictions as minor discrepancies and concluded that the drugs were brought into the room by the appellant. The issues that arose for determination *inter alia* were (i) whether the appellant had actual custody or control of the drugs; (ii) whether presumption of knowledge under s. 37(d) of the DDA was activated; and (iii) whether the JC had subjected the prosecution's evidence to maximum evaluation.

Held (allowing appeal; setting aside conviction and sentence)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The JC failed to subject the prosecution's evidence to a maximum evaluation before calling for the defence. The prosecution's case through the evidence of SP8 was that it was the appellant himself who handed to him the ice cream container containing the drugs, if true, would prove custody and control against the appellant, thereby activating the presumption of knowledge under s. 37(d) of the DDA. However, SP8's testimony was contradicted by SP2 and SP3. Despite the contradiction between SP8, SP2 and SP3, the JC found all the three of them to be truthful witnesses. The JC was not at liberty to accept both versions to be credible when the two versions were irreconcilable and in total conflict with each other. The JC went into further error in finding that the evidence of SP2 and SP3 corroborated the evidence of SP8. (paras 8, 9, 11 & 12)

(2) The contradiction was serious and cuts deep into the prosecution's case as it involved the crucial question of whether the drugs were in the appellant's custody or control at the time of the raid. Where there was a doubt on any essential element of the charge, the doubt must be resolved in favour of the accused especially where the doubt arose from the prosecution's own evidence. The rule that the prosecution's evidence must be subjected to a maximum evaluation at the close of its case required the trial court to direct its mind properly and adequately to every material aspect of the evidence, both for and against the prosecution in order to determine whether the strict requirement of proof had been met by the prosecution. (paras 14 & 16)

(3) Credibility and trustworthiness of any witness was a matter that was entirely for the JC to decide, however, the JC ought to have taken SP2 and SP3's evidence with some reservation or even a pinch of salt as they were all suspects in the case and arrested together appellant. The room where the drugs were found had been rented and occupied by SP2 and there was no dispute that the appellant was a mere visitor on the date

of his arrest. Although SP2 and SP3 had no motive to fix up the appellant, they had every reason to deny any connection with the drugs, since the case involved the death penalty. (paras 18-20)

(4) According to SP2 when she and the appellant arrived at the house, the appellant brought in a white plastic bag and placed it on the floor to the right of the room door. But SP8 in his testimony did not say a word about the presence of any white plastic bag in the room. Therefore, there was not a shred of evidence to show that the ice cream container was taken from inside a white plastic bag, let alone from the same white plastic bag that SP2 said was brought into the room by the appellant. All these were material facts and circumstances which the JC should have considered but failed to appreciate. As such, a real doubt had been cast in the prosecution's case. (paras 21, 22 & 24)

(5) At the time the police entered the room where the drugs were found, the appellant was not in physical possession of the container. In fact, SP3 who was at the edge of the mattress in the same room, was as proximate to the container as was the appellant. So too was SP2 who was the occupier of the room. Thus, it was impossible to say with certainty that it was the appellant and not the others who had actual custody or control of the drugs. (para 25)

(6) There were two conflicting sets of facts before the court over the issue of custody or control, one favourable to the appellant and the other unfavourable to him. The evidence that was favourable to the appellant must be taken to be the truth unless for good reasons, the JC had accepted the other contradictory evidence to be the truth. It is trite jurisprudence that in a doubtful situation, the law leaned in favour of the accused person. The benefit of the doubt must be given to the appellant. The prosecution's failure to explain the conflict in evidence meant that custody or control had not been proved in order to activate the presumption of knowledge under s. 37(d) of the DDA. The defence should not have been called even for the lesser offence under s. 12(2) of the DDA as no *prima facie* case had been established against the appellant. (paras 27, 28 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dipertuduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 105.60g methamphetamine. Pasukan polis yang diketuai oleh SP8 telah menyerbu sebuah rumah di mana pintu rumah tersebut telah dibuka oleh seorang wanita ('SP2'). Selepas memasuki rumah tersebut, SP8 bersama-sama dengan SP2 menuju ke sebuah bilik yang terletak di tengah-tengah rumah. Di dalam bilik tersebut, SP8 telah melihat perayu sedang duduk di atas tilam manakala seorang lagi wanita, SP3 berada di

hujung tilam yang sama. Menurut SP8, perayu telah pergi ke sebelah kanan tilam, mengambil satu bekas ais krim dari lantai dan menyerahkannya kepada SP8. Kandungan di dalam bekas tersebut adalah dadah yang kemudiannya disahkan oleh ahli kimia sebagai 105.60g methamphetamine. Milikan tanpa kebenaran secara sah 50g atau lebih dadah jenis ini akan membangkitkan anggapan pengedaran di bawah s. 37(da) Akta. Di akhir kes pembelaan, Pesuruhjaya Kehakiman ('PK') telah melepaskan dan membebaskan perayu daripada pertuduhan pengedaran kerana perayu telah berjaya mematahkan anggapan pengedaran di bawah s. 37(da) Akta. Walau bagaimanapun, PK mendapati perayu bersalah atas kesalahan di bawah s. 12(2) dibaca bersama-sama dengan s. 39A(2) dan menjatuhkan hukuman 17 tahun penjara dan sepuluh sebatan terhadap perayu. Terkilan, perayu merayu terhadap sabitan. Perayu menghujahkan, antara lain, bahawa PK telah gagal untuk membuat penilaian maksima ke atas keterangan yang dikemukakan oleh pihak pendakwaan. Kes pendakwaan melalui keterangan SP8 adalah bahawa perayu sendiri yang menyerahkan bekas ais krim yang mengandungi dadah kepada SP8. Sebaliknya, keterangan SP8 telah disangkal oleh SP2 dan SP3 yang memberi keterangan bahawa bekas ais krim tersebut ditemui hasil daripada carian polis. Keterangan SP2 mengenai kehadiran plastik putih yang dibawa masuk yang perayu ke dalam bilik tersebut juga diragui. Walau bagaimanapun PK telah menolak percanggahan tersebut sebagai percanggahan kecil dan membuat kesimpulan bahawa dadah tersebut telah dibawa ke dalam bilik oleh perayu. Isu-isu yang berbangkit untuk penentuan, antara lain, adalah (i) sama ada perayu mempunyai jagaan atau kawalan dadah; (ii) sama ada anggapan pengetahuan di bawah s. 37(d) DDA diaktifkan; dan (iii) sama ada PK telah menilai keterangan pendakwaan dengan penilaian maksima.

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman) Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) PK telah gagal menilai keterangan pendakwaan dengan penilaian maksima sebelum memanggil pembelaan. Kes pendakwaan melalui keterangan SP8 bahawa perayu sendiri menyerahkan bekas ais krim yang mengandungi dadah kepada SP8, jika benar, akan membuktikan jagaan dan kawalan terhadap perayu, lantaran itu, mengaktifkan anggapan pengetahuan di bawah s. 37(d) Akta. Walau bagaimanapun, keterangan SP8 telah disangkal oleh SP2 dan SP3. Walaupun terdapat percanggahan antara SP8, SP2 dan SP3, PK telah mendapati bahawa ketiga-tiga mereka adalah saksi yang boleh dipercayai. PK tidak mempunyai kebebasan untuk menerima kedua-dua versi sebagai kredibel apabila kedua-dua versi adalah tidak serasi dan bertentangan sepenuhnya antara satu sama lain. PK juga telah terkhilaf apabila membuat dapatan bahawa keterangan SP2 dan SP3 menyokong keterangan SP8.

(2) Percanggahan tersebut adalah serius dan memudaratkan kes pendakwaan kerana ia melibatkan persoalan yang penting iaitu sama ada dadah tersebut berada dalam jagaan atau kawalan perayu pada masa serbuan. Jika terdapat sebarang keraguan terhadap elemen penting dalam pertuduhan, keraguan tersebut hendaklah diselesaikan dengan memihak kepada tertuduh terutamanya apabila keraguan timbul daripada keterangan pendakwaan sendiri. Peraturan bahawa keterangan pendakwaan mestilah dinilai secara maksima di akhir kes pendakwaan memerlukan mahkamah bicara untuk mengarahkan mindanya dengan wajar dan secukupnya kepada setiap aspek bukti material, yang menyokong dan menentang pihak pendakwaan untuk menentukan sama ada keperluan ketat pembuktian telah dipenuhi oleh pihak pendakwaan.

(3) Kredibiliti dan kebolehpercayaan saksi-saksi adalah perkara yang boleh dipertimbangkan sepenuhnya oleh PK, walau bagaimanapun, PK seharusnya menerima keterangan SP2 dan SP3 dengan ragu-ragu atau dengan berhati-hati kerana SP2 dan SP3 adalah suspek dalam kes dan ditangkap bersama perayu. Bilik di mana dadah dijumpai telah disewa dan diduduki oleh SP2 dan tiada pertikaian bahawa perayu adalah seorang pengunjung pada tarikh perayu ditangkap. Walaupun SP2 dan SP3 tidak mempunyai motif untuk menganiaya perayu, mereka mempunyai banyak alasan untuk menafikan sebarang kaitan dengan dadah tersebut, lebih-lebih lagi apabila kes melibatkan hukuman mati.

(4) Menurut SP2, apabila SP2 dan perayu tiba di rumah, perayu telah membawa masuk beg plastik putih dan meletakkannya di atas lantai di sebelah kanan pintu bilik. Tetapi SP8 dalam keterangannya tidak menyatakan apa-apa mengenai kehadiran beg plastik putih di dalam bilik tersebut. Oleh itu, tiada bukti untuk menunjukkan bahawa bekas plastik ais krim telah diambil dari dalam beg plastik putih, apatah lagi dari beg plastik putih yang sama yang dikatakan oleh SP2 telah dibawa ke dalam bilik oleh perayu. Semua ini adalah fakta dan hal keadaan yang sepatutnya dipertimbangkan oleh PK tetapi gagal untuk diambil kira. Oleh itu, keraguan besar telah berbangkit dalam kes pendakwaan.

(5) Semasa polis memasuki bilik di mana dadah dijumpai, perayu tidak mempunyai milikan fizikal ke atas bekas tersebut. Malah, SP3 yang berada di tepi tilam di dalam bilik yang sama berada pada jarak yang sama antara bekas dan perayu. Begitu juga dengan SP2 yang merupakan penghuni bilik. Justeru, adalah mustahil untuk menyatakan dengan pasti bahawa perayu dan bukan orang lain yang mempunyai jagaan atau kawalan sebenar ke atas dadah.

(6) Terdapat dua set fakta yang bercanggah di mahkamah mengenai isu jagaan atau kawalan, satu memihak kepada perayu dan yang lain tidak memihak kepadanya. Keterangan yang memihak kepada perayu perlu

diambil kira sebagai benar kecuali atas sebab-sebab yang munasabah PK telah menerima keterangan bercanggah yang lain sebagai benar. Adalah jurisprudens bahawa dalam keadaan ragu-ragu, undang-undang akan memihak kepada tertuduh. Manfaat keraguan harus diberikan kepada perayu. Kegagalan pihak pendakwaan untuk menjelaskan konflik dalam keterangan bermakna jagaan atau kawalan tidak dibuktikan untuk mengaktifkan anggapan pengetahuan di bawah s. 37(d) Akta. Pembelaan tidak sepatutnya dipanggil walaupun untuk kesalahan yang lebih ringan di bawah s. 12(2) Akta kerana tiada kes *prima facie* telah dibuktikan terhadap perayu.

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(d), (da), 39A(2)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Nurshafini Mustapha; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Goh Ming Han [2014] 1 LNS 1089.]

Reported by Sandra Gabriel

JUDGMENT

Abdul Rahman Sebli JCA:

[1] The appellant was charged in the High Court at Melaka for drug trafficking and the charge against him is as follows:

> Bahawa kamu pada 26/1/2012 jam lebih kurang 3.30 petang di alamat B1, Pangsapuri Kesidang Sek 2, Jalan Kesidang 2/11, Taman Kesidang, Tengkera, di dalam Daerah Melaka Tengah, di dalam Negeri Melaka telah didapati mengedar dadah berbahaya iaitu 105.60 gram Methamphetamine. Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The salient facts. On 26 January 2012 Inspector Mohd. Hisham bin A Rahman ('SP8') led a police party of 13 personnel including two anti-corruption officers to raid a house at the time and place specified in the charge. They were in civilian clothes. On their arrival at the target house at about 3.25pm the door was locked. SP8 knocked the door several times and after two minutes the door was opened by a female later identified as SP2.

[3] After gaining entry into the house, SP8 together with SP2 and some other police personnel proceeded to the room located in the middle of the house. Inside the room SP8 saw a Chinese male later identified as the appellant sitting on a mattress and leaning against the wall while another female, a Malay ('SP3') was at the edge of the same mattress. This female is the younger sister of SP2.

[4] SP8 introduced himself as a police officer and at the same time instructed two of his personnel to carry out checks on SP2, SP3 and the appellant. Nothing incriminating was found on them. Then according to SP8 the appellant went to the right side of the mattress, picked up an ice cream container from the floor and handed it to him. Inside the container were the drugs, the subject matter of the charge which the chemist confirmed after analysis to contain 105.6g of methamphetamine.

[5] Possession without lawful authority of 50g or more of this drug would trigger the presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952 ('the DDA'). On these facts the appellant was called upon to enter his defence. He elected to give sworn evidence.

[6] At the conclusion of the defence case the learned Judicial Commissioner acquitted and discharged the appellant of the trafficking charge as he found that the appellant succeeded in rebutting the presumption of trafficking under s. 37(da) of the DDA. He however found the appellant guilty of the offence under s. 12(2) read with s. 39A(2) and sentenced him to 17 years imprisonment and ten strokes of the rotan.

[7] The Public Prosecutor did not file any appeal against the appellant's acquittal in respect of the trafficking charge but the appellant appealed against his conviction for the offence under s. 12(2) and hence this appeal. Two grounds were advanced, as follows:

(i) That the learned trial judge failed to conduct a maximum evaluation of the evidence adduced by the prosecution; and

(ii) That the learned trial judge failed to appreciate the defence of the appellant.

[8] Having considered the arguments of both sides carefully we unanimously allowed the appeal. We agreed with learned counsel for the appellant that the learned Judicial Commissioner failed to subject the prosecution's evidence to a maximum evaluation before calling for the defence. As alluded to earlier, the prosecution's case through the evidence of SP8 is that it was the appellant himself who handed to him the ice cream container containing the drugs. This if true would prove custody and control against the appellant, thereby activating the presumption of knowledge under s. 37(d) of the DDA.

[9] But SP8's testimony was contradicted by two eyewitnesses, namely SP2 and SP3 who testified that the ice cream container was recovered as a result of a police search, meaning to say it was not handed to SP8 by the appellant himself as claimed by SP8. According to SP3 the container was lying on the floor when it was found by the police. This is SP2's evidence in examination-in-chief:

> J: Selepas itu polis tanya ada simpan apa-apa barang terlarang, saya jawab "tak". Semua jawab "tidak ada". Selepas itu, polis buat pemeriksaan dan saya diarahkan ke tepi sebelah adik saya di sebelah kiri, polis jumpa bekas aiskrim warna merah, dan tunjukkan barang sudah ada dalam bekas itu, dan polis tanya "siapa punya".

[10] SP3's evidence is as follows:

J: Polis tanya ada simpan barang salah atau tidak. Saya cakap tidak ada. Lepas itu, dia check dalam kocek seluar saya. Tidak jumpa apa-apa. Lepas itu, polis geledah dalam bilik.

S: Selepas itu apa yang berlaku?

J: Masa polis periksa, polis menjumpai tupperware mangkuk aiskrim warna merah.

S: Diambil dari mana?

J: Itu dalam bilik atas lantai.

[11] Despite this glaring contradiction in the testimonies of SP2 and SP3 on the one hand and SP8 on the other, the learned Judicial Commissioner found all three of them to be truthful witnesses when he said "Saya mempercayai SP2 dan SP3" and later "Saya juga mendapati tidak ada alasan untuk saya untuk tidak mempercayai keterangan SP8 ..." (p. 24 of the judgment).

[12] With due respect to the learned Judicial Commissioner, he was not at liberty to accept both versions to be credible when the two versions were irreconcilable and in total conflict with one another. Either he believed SP2 and SP3 or he believed SP8 or he disbelieved all three of them. The learned Judicial Commissioner went into further error when he said that the evidence of SP2 and SP3 corroborated the evidence of SP8.

[13] The contradiction gives rise to the question; what did the prosecution prove at the close of its case in relation to custody or control of the container that contained the drugs? Was the container lying on the floor and picked up by the police or was it picked up by the appellant and handed to SP8? This fact was never established one way or the other as the learned Judicial Commissioner did not make a finding either way.

[14] The contradiction is serious and cuts deep into the prosecution case as it involves the crucial question of whether the drugs were in the appellant's custody or control at the time of the raid. It is trite law that where there is a doubt on any essential element of the charge the doubt must be resolved in favour of the accused especially where as in this case the doubt arose from the prosecution's own evidence.

[15] The learned Judicial Commissioner however dismissed the contradiction as a minor discrepancy and concluded that the drugs were brought into the room by the appellant who placed it next to the mattress near the door. It was of course for the learned Judicial Commissioner to make such finding of fact but before doing so he had a duty to evaluate the entire evidence and the probabilities of the case.

[16] The rule that the prosecution's evidence must be subjected to a maximum evaluation at the close of its case requires that the trial court directs its mind properly and adequately to every material aspect of the evidence both for and against the prosecution in order to determine whether the strict requirement of proof has been met by the prosecution.

[17] In finding that it was the appellant who put the container near the mattress inside the room, it is clear that the learned Judicial Commissioner relied heavily on the evidence of SP2, SP3, SP4 and SP6 who denied having anything to do with the drugs. The evidence of SP2 was particularly damaging to the appellant as her testimony was that it was the appellant who brought the white plastic bag into the room where the drugs were found.

[18] With due respect to the learned Judicial Commissioner although the credibility and the trustworthiness of any witness is a matter that is entirely for him to decide, he ought in the circumstances to have taken their evidence with some reservation or even with a pinch of salt as they were all suspects in the case and in fact arrested together with the appellant in the same house. SP8 himself admitted in cross-examination that the reason why he arrested everyone in the house was because he did not know who owned the drugs, and this was despite having told the court that it was the appellant who handed the drugs to him.

[19] It is also a fact that the room where the drugs were found had been rented and occupied by SP2 for about one month prior to the raid and there is no dispute that the appellant was a mere visitor on the date of his arrest. According to SP3, her sister ('SP2') and the appellant were friends. SP4's testimony on the other hand is that SP2 was the appellant's girlfriend.

[20] The learned Judicial Commissioner may be right in holding the view that these witnesses had no motive to fix up the appellant but for obvious reasons they would have every reason to deny any connection with the drugs, more so when the case involved the death penalty.

[21] Further, the prosecution's evidence on the identity of the stuff that the appellant allegedly brought into the house is not free from doubt either. According to SP2 when she and the appellant arrived at the house the appellant brought in a white plastic bag and placed it on the floor to the right of the room door. Obviously the purpose of adducing this evidence was to show that the plastic bag that the appellant carried contained the drugs although SP2 claimed that she did not see what was inside the bag.

[22] But SP8 in his testimony did not say a word about the presence of any white plastic bag in the room. His evidence is that the appellant handed to him a red coloured ice cream plastic container which he said the appellant took from the right side of the mattress. There is not a shred of evidence to show that the red ice cream plastic container was taken from inside a white plastic bag, let alone from the same white plastic bag that SP2 said was brought into the room by the appellant.

[23] There were two white plastic packets produced as evidence through SP8 and marked as "A1" and "A2" but no evidence was adduced to show any connection between these plastic packets and the white plastic bag referred to by SP2. In fact SP8's evidence at p. 171 of the appeal record shows that "A1" and "A2" were found inside the ice cream container, which were actually the plastic packets that contained the drugs. Clearly neither could be the white plastic bag used to carry the ice cream container, if at all there was such a white plastic bag.

[24] All these in our view are material facts and circumstances which the learned Judicial Commissioner should have considered but failed to appreciate. Had he done so he would have found that a real doubt had been cast in the prosecution's case as to whether it was the appellant who brought the ice cream container into the room, bearing in mind there were four other persons in the house and a bottle which had been modified for smoking syabu was also found in the house.

[25] It is important to bear in mind that at the time the police entered the room where the drugs were found, the appellant was not in physical possession of the container, and neither were the other occupants of the house. In fact SP3 who was at the edge of the mattress in the same room was as proximate to the container as was the appellant. So too was SP2 who was the occupier of the room. Under these circumstances it is impossible to say with certainty that it was the appellant and not the others who had actual custody or control of the drugs.

[26] The fact that the appellant tried to bribe the police, even if true does not change the fact that the prosecution's evidence on a crucial aspect of the case, ie, custody or control was not on firm footing. The bribery attempt would be potent evidence against the appellant if only he had been caught with physical possession of the drugs or had admitted to ownership of the drugs. Otherwise there are other inferences capable of being drawn from his act of attempting to bribe the police.

[27] What is clear in this case is that there were two conflicting sets of fact laid out before the court over the issue of custody or control, one favourable to the appellant and the other unfavourable to him. The evidence that is favourable to the appellant is the evidence of SP2 and SP3 that the container containing the drugs was lying on the floor, thus negating custody and control on the part of the appellant. The evidence that is unfavourable to the appellant is the evidence of SP8 which shows otherwise.

[28] In this kind of situation the evidence that is favourable to the appellant must be taken to be the truth unless for good reasons the learned Judicial Commissioner had accepted the other contradictory evidence to be the truth, which unfortunately he did not when he accepted both versions to be true.

A It is trite jurisprudence that in a doubtful situation such as this the law leans in favour of the accused person. The prosecution's failure to explain the conflict in evidence means that custody or control had not been proved in order to activate the presumption of knowledge under s. 37(d) of the DDA.

B **[29]** In view of the unsatisfactory state of the evidence led by the prosecution we did not feel that the conviction was safe. We may be convinced ourselves that the appellant committed the offence but the strict requirement of proof does not allow us to bridge any gap in the prosecution's case. The benefit of the doubt must be given to the appellant.

C **[30]** In our view the defence should not have been called even for the lesser offence under s. 12(2) of the DDA as no *prima facie* case had as a matter of law been established against the appellant. As for the second ground of appeal we do not find any necessity to deal with it as we are with the appellant on the first ground.

D **[31]** It was for reasons stated above that we allowed the appellant's appeal, set aside the conviction and sentence and ordered him to be acquitted and discharged.

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